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Key Issues in Disentangling the Kenyan Crisis

Evictions, Autochthony and Land Privatization

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- ¹ In Kenya, as elsewhere, it is not unusual to construe in xenophobic terms the injustices that have been experienced. Grievances have been translated into a language of indigenous and territorial claims to land. Not going along with this rhetoric enables us to take the measure of existing injustices.
- ² In order to cast light on the land problem in Kenya, we will define it at first in a simple way. We will limit our focus to cases of eviction of regular occupants of a piece of land, such as: landless peasants or squatters evicted from government land like gazetted forests (Mt Elgon and Mt Kenya forests, for instance); peasants who lost access to land following legal privatization (in relation to the gradual extension of land registration); peasants who lost their land in politically-instigated ethnic conflicts;¹ and finally peasants who were left out of land redistributions by the State to compensate cases of eviction.
- ³ On the whole, more and more youth from rural areas do not have access to land for cultivation. Some of them, who are educated, aspire for a different life. Those who will provide for their families solely from the land are few. This has been the case for a number of years, as demonstrated by migrations since the colonial days in search for work. However, it now seems a line is being crossed as less and less poor have access to land, even as a fallback resource. This is the case in towns as well as in the rural areas. Casting light on the recent crises through an analysis of population growth and land shortage would be the subject of a separate paper². In this paper, I have opted to carry out a political and legal analysis of the land crisis in order to underline its political dynamics. Despite structural constraints related to population and land, the recourse to violence should not be viewed as the only possible response nor should its legitimization through xenophobic political ideologies be seen as the only solution³. Since independence, violence has taken over from intense negotiations over land allocations, which led to a rather inequitable form of ethnic bargaining, to which today's State legitimacy crisis is linked. Kenya is no longer experiencing the momentum of land redistributions as in the

1960s and 1970s, which enabled the neo-patrimonial State⁴ to perpetuate itself in spite of corrupt and authoritarian practices.

- 4 From the simple definition that we gave in the beginning, it is worth noting that the problem of access to land and evictions is not as straight forward as expected. First, we will examine the issue of indigenous land claims separately from the issue of land injustices and inequalities, which then will enable us to understand how indigenous claims and neo-patrimonial practices by political leaders contributed to the current land crisis.

The issue of autochthony

- 5 Whereas the language of autochthony⁵ tries to lock us in an essentialist vision of identity, it is inconceivable to grasp a phenomenon of this nature without considering it dynamically. The shaping of new identity platforms must be interpreted in their strategic dimension, in relation to the local, national and even international political context.
- 6 Autochthony is characterized in Kenya by territorial land claims that entertain the idea of local resources as belonging exclusively to those born and bred on the land. As such “indigenous” communities and access to resources are defined in territorial terms. At the scale of a nation-state, the idea of a corresponding land-based community is widespread, but in this case autochthony is defined at a sub-national level. How can this be explained? In Kenya, the link made between land, territory and ethnicity has nothing to do with ancestry and is, first and foremost, part of an administrative tradition⁶. In the colonial era, administration contributed to shape ethnic territories by introducing the idea of reserved lands (ethnic reserves, White Highlands). Internal borders came to play a role in the territorial and ethnic definition of ownership of local resources, particularly land. This heritage translated into the current administrative practice of assigning citizens to regions of origin, a fictitious affiliation to a large extent in a context of widespread migrations at a national scale. The administration’s pervasive territorial rationale is reflected, in its form at least, in the language of autochthony. The majimbo ideology, which emerged in the 1960s, then re-emerged in the 1990s, in the sunset days of Daniel arap Moi’s regime, and again in 2007, during the presidential campaigns, backs autochthony from a political point of view. It advocates for a local and ethnic definition of access to resources through administrative regions and calls for so to speak, regional preference or bias.

Autochthonous claims

- 7 The list of autochthonous claims is very long, even though those that caused ethnic violence are fewer. Examples abound and some of these claims might even take us by surprise because they refer to groups that are not always identified in ethnic terms at the national level. For instance, the Kalenjin, Luhya and Mijikenda umbrella identities might be divided into several sub-ethnicities - which can themselves, be subdivided into smaller units. One might choose to stress one level or another of belonging depending on a given context. In its own way each level of ethnicity has acquired a territorial basis. Some identities fit into each other like Russian dolls while others are locked in a binary opposition. In the case of fitted levels of identity there seems to be so to say no contradiction in stressing one or another level (national and ethnic identity, as well as

sub-tribe) in a given situation. Nevertheless in some circumstances, they become incompatible, as shown by the example of denunciation of Kalenjin ethnicity by the various sub-groups which are supposed to belong under its umbrella. This happens especially in cases of territorial competition. These levels of identity assertion can in turn be understood in relation to levels of antagonisms (for example the Kalenjin against the Luhya or, at a lower level, the Sabaot against the Bukusu). Conflicts generally contribute to setting these levels of identity: in times of crisis, the Kalenjins unite against the Kikuyus or the Luyhas and, at a lower level, in spite of their internal conflicts, the Sabaot gang up against the Bukusu. Ethnicity becomes flexible or rigid depending on the circumstances, and that is what needs to be kept in mind, just like the importance of underlying territorial resource-based stakes.

- 8 In the Rift Valley Province, the Kalenjin are laying a major claim on the land formerly held by Europeans, while the Maasai are claiming back former grazing land within their districts which have been cultivated by migrants from other regions of Kenya. Though these two communities have strong pastoral traditions, they are now staking claim on the land with a view to being in charge of their agricultural development. They refer to land evictions for which they blame a particular ethnic community collectively (Europeans, the Kikuyu, the Luhya, etc.). In addition to the overall Kalenjin claim to the Rift Valley Province, there are also separate demands for land by Kalenjin subgroups: Sabaot, Pokot, Nandi, Keiyo, Marakwet, Tugen, Kipsigis, etc. These sub-groups sometimes come into direct competition with each other, as demonstrated by the incidents of conflict between the Pokot and the Marakwet in northern Marakwet, and the rivalry between the Nandi and the Keiyo in Uasin Gishu District over the repossession of European land. An internal conflict among the Sabaot⁷, which brought about ethnic polarization along the lines of two sub-groups namely the Ndorobo (or Ogiek) and the Bok, led to unprecedented incidents of violence in Mount Elgon in the period preceding the December 2007 elections. At stake was the control of land resources through control of political power. The up-scaling of the conflict from an intra-Sabaot one to one between Sabaot and Bukusu neighbours, which is a reminder of the conflicts in the 1990s, might be viewed as an outlet intended to satisfy the need for land among the Sabaot with the expulsion of the Bukusu from a wider area.
- 9 The indigenous claim by the Ogiek or Ndorobo in Mount Elgon, is not an isolated case in the Rift Valley Province. The identity statement by the Ogiek emphasizes an autochthonous right to land and a separate ethnic identity, with regard to the rest of the sub-groups of Kalenjin speakers. An alliance between the various groups that claim a “hunter-gatherer” identity in the Rift Valley Province has appeared. The Sengwer who live the Cherangani hills, the Ogiek of Mount Elgon and Mau forests claim to be in a way more indigenous than other Kalenjin-speakers in the Rift Valley: a discourse which backs the demand for privileged access to forest resources, which does not preclude the conversion of forests into agricultural land.
- 10 In the 1990s other claims of indigenous nature, along the coast, in central (in the Meru and Embu districts) and also in western Kenya were voiced. During the colonial days the border between the Luo and the Luhya was disputed, not anymore despite some lingering demands. In Nyanza Province occupied by a Luo majority, the Basuba and Kuria separatisms were incited by the Moi regime. Demands by the Teso in Western Province, occupied by the Luhya majority, caused a crisis. Tensions translated more into administrative demands (border reviews and creation of new districts) than into demands

for land in these cases. Along the coast, land is a major contentious issue. The level of Mijikenda ethnicity has been defined in relation to a Swahili identity within an urban context in Mombasa.⁸ During the 1990s, a conflict orchestrated by powerful individuals within the Moi regime, exploiting xenophobic sentiments, pitted the Mijikenda against the upcountry people. At a lower notch, rivalries between various Mijikenda subgroups emerged. Thus, along the coast as well as in Western and Rift Valley Provinces, the majimbo ideology, that is based on the idea regional preference was advocated for by local politicians at different times in history.

- 11 Ethnic identity statements, be they more or less manipulated or instrumental, are all political in nature.

Autochthony and evictions

- 12 Autochthonous discourses that have emerged since the 1980s, are at the crossroads between local land grievances and international platforms interested in indigenous groups, particularly the Ogiek and the Maasai, and also, at a different scale, between national and local political strategies. Indigenous claims came to be known through violence in 1990s.
- 13 Xavier Péron emphasizes that in the 1980s there were several groups advocating for indigenous platforms among the Maasai fighting for different ideas of “common” interest. Local authorities in Narok tried to make their presence felt in international circles in the defence of indigenous people’s rights in the same way as non governmental organizations who were fighting against them on a daily basis.⁹ To mention just an example, the activities of the local authorities went against the local community’s interests in the management of Loita Forest, at a time when local authorities sought to transform the area into a second Maasai Mara with the exclusion of its regular residents. Examples of abuse of office, corruption, amassing of wealth by local political leaders and eviction of ordinary residents were not going unnoticed and some NGO voiced their condemnation. The issue of repossession of this indigenous platform by political leaders, whose objective was merely to maintain themselves in power and to guarantee their own access to resources, re-emerged more clearly in the 1990s.
- 14 The Moi regime, which was then under threat due to the reintroduction of multi-party politics, tried to perpetuate its rule by all means including the encouragement of xenophobic violence and a political alliance around the Kalenjin and “minority tribes.” National political strategy and local demands merged in the KAMATUSA¹⁰ claims on the Rift Valley Province, to which are associated different incidents of violence organized by Maasai, Kalenjin and Samburu leaders in the 1990s. The Kikuyu and the Gusiis settled in the Maasai districts were targeted in evictions orchestrated by Maasai leaders with some complicity on the part of the administration. The Kikuyu, the Luhya, the Gusii and the Luo settled in areas west of Nakuru were targeted in violence organized by Kalenjin leaders still with some complicity on the part of the Moi government.
- 15 The violent trend observed in autochthonous claims cannot as such be explained by their artificial nature, which should however be emphasized, since it has been instrumental for political strategists. Autochthonous claims have been used for political gain. Autochthony, as a political discourse, legitimates the recourse to violence to settle land grievances. A territorial definition of land ownership as supported by some political leaders is presented as a means to fight evictions viewed in ethnic terms.

- 16 The principle of political autochthony, backed by some leaders, made it possible to legitimize untold violence. Trapped in the local and national discourses on autochthony, some international institutions provided alibi for this violence. No leader is ready to commit political suicide by admitting that the hijacking of access to land by politicians is the root of major land problems, unless it means denouncing a political rival or better still accuse an ethnic community that would shoulder the blame for its leaders. This explains the success of autochthony. The political position of defending autochthony enables a leader to hide his real motives while acting as the champion of a collective cause such as land. Nevertheless, the fight is said to be collective while the gains are individual. Leaders of these communities began by eating themselves, as shown by the examples of D. arap Moi and William ole Ntimama, a Maasai leader who is still active in 2008.
- 17 Land grabbing is the best shared activity among the different generations of political leaders in Kenya. Combined with a territorial strategy that is rooted in the ideology of autochthony, the damage they have caused has not yet been measured. In Kenya's recent history, some leaders, regardless of their ethnic affiliation, have preferred chauvinistic stances and xenophobic political mobilization to denouncing corrupt political practices. Mobilisation across the ethnic divides against corrupt political practices still remains minimal, despite parliamentary reports which provide evidence.¹¹ In Trans Nzoia District, a movement initiated by Father Dolan was quickly quelled by a class of administrators and politicians. Whereas inequalities in accessing land result above all from political options and practices, they are generally presented in ethnic terms.

Local land situation and eviction processes

- 18 Legal privatization of land has been presented as a solution to all problems. It is enough to highlight the importance of the paradigm of the title deed in a context of obvious tension over land and the emergence of a territorial stake in land outside the scope of legality.
- 19 The first attempt to control the reproduction of African societies was territorial in nature. By introducing internal borders, the colonial government blocked settlement frontiers and movements of pastoral people. The key arrangement for colonial land evictions was legal (through the creation of the legal fiction that crown land represented)¹². African settlements, now restricted in their expansion ended up getting the legal status of communal land (trustland). In the next stage, the transformation of access to land was characterized by a legal process of land registration. The early introduction of land privatization is undoubtedly not foreign to the success of today's legal privatization paradigm. Legal private land ownership spread to African areas in the 1950s from the European lands. Title deeds were considered as guaranteeing security of tenure. Nevertheless, the introduction of title deeds contributed to the creation of new rules of access to land that destabilized the previous forms of regulation. The fact that legal privatization became synonymous with security of tenure, at the discourse level, conceals the injustices that its implementation gave rise to and negates the fact that the two terms are far from being equivalent. In the context of recent ethnic conflicts, the title deed was worth nothing in the face of territorial claims that go beyond it and define legitimacy of access to land at a non statutory level. It is worth noting, despite everything, that the situation of people who had title deeds, in relation to others, was different in the

medium-term. The title deed, where it existed, was a form of guarantee, insofar as land could not be repossessed by a third party without other formalities. In 2008, a step further was taken within the urban context with regard to awareness about this legal obstacle: some gangs endeavoured to demand the title deed in addition to confiscating the property. Safeguarding ownership is not necessarily synonymous with privatization, except that today the title deed has become the panacea. Nevertheless, the extent of legal privatization and the idea that it is operative are another fiction that needs to be denounced. From local histories, a wide range of situations exist in Kenya. They relate to land regimes and specific forms of land ownership that also contribute to explaining particular forms of expropriation that have locally emerged.

- 20 Some regions were subject to a legal process of land registration, others, mainly the arid regions, were not included. Registered land is found mainly in the most fertile regions, in the highlands of the south western quarter of the country. Yet, even in this part of the country, the process is blocked in some places. In areas where land registries exist and where it is in theory possible to get a title, in practice, ordinary residents don't always have access to them. Areas where it is possible to get a title enter into two broad categories: areas where land registration was introduced more than thirty years ago; and areas where large-scale farms were kept largely intact.
- 21 In the former trust lands registered from the 1950s up to the 1970s, in Central, Western and Nyanza provinces and in some districts of the Rift Valley province, legally defined family estates exist since the land was generally registered in the name of a grand-father. Titles have not necessarily been collected from the administration unless the need was felt (for instance in cases of land transactions). The grandfather's land, at present too small to sustain all his descendants, might be considered now as clan land: it serves for burials, when no other land was acquired in a life-time. Large-scale farms in the former White Highlands which might have been transferred to African owners and only minimally subdivided also have titles.
- 22 To obtain a title deed is nearly impossible in some places located in the highlands, even though the area under trust land has shrunk and most lands have undergone registration, though they might be at different stages of the programme implementation. In some instances the process of land registration was blocked by conflicts and by the slowness of bureaucratic procedures. Titles are also difficult to get in former European areas, in cases where large-scale farms were subdivided into many shares; as well as, in particular settlement schemes on government land such as Chebyuk in Mount Elgon.
- 23 During the 1980s and 1990s, the process of land registration was carried out in some parts of Kenya such as Meru, Marakwet or Trans Mara and experienced many difficulties which slowed it down. It sparked violence, because the legal process of land individualization and privatization was seen as a way to redefine land rights on a territorial basis: only a given group is entitled to land in a given location. Due to this, the rights of some old time residents were not recognized during the registration process. In areas where land registration was introduced first, individually demarcated plots existed. In spite of this fact land evictions were organised or could not be prevented given the rules laid out for land registration. When actual occupation of land did not provide landmarks for individual property, as it is often the case in pastoral regions, the possibility of losing access to land was multiplied. In the pastoral zones, the process of land registration went through several steps, which constituted as many renewed opportunities for evictions. During the first stage, collective ranches were put in place. Their creation did not

preclude the possibility of introducing individual ranches, quite the opposite. Influential people hastened to start private ranches, at the same time sabotaging the spirit of the collective enterprise. During a second phase, the directive became legal privatization of the entire land, with renewed consequences in terms of inequalities in sharing land and access to resources. The legal framework of the reform has been used or misused by a ruling class for its own benefit.

- 24 Former European lands also went through a process of subdivision, in several stages. Today when farms are subdivided in large portions of land, the processing of titles is expected to take four years with the help of a lawyer specialized in the field of land administration and rights. In the case of large-scale farms subdivided in numerous plots for the benefit of a large number of recipients (land buying companies or cooperatives), issues of management, usurpation of rights and financial difficulties make it impossible to get a title. According to an official source, in 2007, among the twenty land buying cooperatives bordering to the natural reserves of the Mt Elgon in Trans Nzoia, only two succeeded in getting individual land titles for their members. To acquire a title is a long process which requires funds and determination and brings out inequalities. Members of land-buying companies are especially vulnerable in this regard and some members are evicted with ease through various strategies. During the ethnic clashes of the 1990s, everywhere in the Rift Valley province, membership in land-buying companies was highly disputed; with no real legal mechanism to guarantee land ownership.
- 25 Forests, under the direct control of government, have been considered widely like potential land reserves, as demonstrated by the Moi regime. Although classified, forest land was converted into agricultural land in a temporary or permanent way. Whether they were classified as governmental land (under the jurisdiction of the central power) or as trust land (under the jurisdiction of local authorities), they have been managed without a long-term policy, and access set in a discretionary way. In accordance with its neo-patrimonial practices, the State decided whether or not to apply some rules concerning the protection of forests or distorted them for its own profit or political gain. As a result, at times, people are allowed to engage in different activities in the forest reserves and, at times, they are not, an occurrence creating strong resentment. This mode of government has left its imprint in Mount Elgon and Mount Kenya. It is responsible for an ecological disaster in the Mau escarpment. Kipsigis farmers managed to buy land in the forest reserve of the Mau through the making of corrupt political leaders both Kipsigis and Maasai from 1997 to 2004. It took time for the new Kibaki administration to put an end to this colonization.¹³ The settlers ended up by being chased, after having destroyed the forest. As a result, and this is not unusual in Kenya, the person who actually bought the land was evicted whereas the politicians who actually made the deal and ended up benefiting from the transactions were not disturbed. Forest lands under the protection of local authorities, such as part of the destroyed Mau forest, were not managed in a better way. Local authorities have in some cases organised the stealing, whereas they were supposed to manage forest resources for the benefit of the ordinary residents of the locality.

Conclusion

- 26 The idea of a territorial claim to land, defined by administrative limits, without taking into account work invested in land but rather autochthonous demands, is presented by

some leaders as a strategy to fight against evictions understood solely in ethnic terms. This type of discourse has, to some extent, justified the recourse to violence and has contributed, through the conflicts it created, to more land evictions. Is there a peaceful territorial solution to land problems in Kenya? In the past there have been strong pressures to translate political autochthony into law and this might happen again in the context of the management of the post-electoral crisis.

- 27 Over the years, the State's hesitations over the issue of territorial and ethnic claims to local resources are noticeable: backing them then taking a legal stance in defence of the right to individual property. In principle, a title does not take into consideration neither the place nor the person, neither are the means by which a title is acquired questioned. During the 1990s, political autochthony sustained by the Moi regime contributed to create confusion.
- 28 From a different perspective the Bomas constitutional project¹⁴ also reflects this hesitation, by insisting both on the protection of individual rights and at the same time referring to ancestral rights to land. In a way it attempted to circumscribe the legitimacy of autochthonous claims: only hunter gatherers were specifically mentioned as entitled to claim for such rights. However, autochthonous claims are common in Kenya and contradict the idea of the sanctity of private property: they might not be so easily contained.
- 29 If the State is serious about accommodating these two apparently contradictory positions, it should come up with a system of compensation for legal acquisitions of land outside one's autochthonous "territory" for people who had bought land in an area they do not "belong" to. In many cases, political and administrative intermediaries benefited financially from the sale of land everywhere in Kenya and created the problem. The best would be to force the actual thieves or crooks, which most commonly belong or belonged to government, to pay for compensation.
- 30 Autochthonous claims defend the idea of a collective responsibility in evictions, blaming them on another ethnic group: the Europeans chased the Sabaots from Trans Nzoia, in turn the Sabaots attempted to chase the Bukusus who had settled in the European land of Trans Nzoia. This perception should be discarded as it carries in itself injustice. On the other hand, individual cases of land confiscations should be documented in order to attain justice and redress blatant cases of evictions. Why is it so important to protect the rights of the poor and their access to land? One might reasonably consider land as a fallback resource. The importance of access to land is illustrated by the obsession of buying a plot. Buying a plot is seen as a necessity by many, a dream that only a few people, belonging to the middle class, will achieve today, while choosing the location carefully taking into account ethnic and territorial considerations.

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NOTES

1. They can be referred to as such without losing sight of the essentially political dimension of "ethnic conflicts" (throughout the 1990s and during the 2007–2008 period, in particular).
2. J. Ouko 2002, V. Golaz 2002.
3. This term applies to Kenya insofar as it describes hatred for the 'other' within a national context.
4. The neo-patrimonial State's power is based on the confusion between private and public spheres. Refer to D. Bourmaud, 1988.

5. For a discussion on autochthony, on claims to be “sons of the soil,” see Lonsdale J., 2008, *Journal of Eastern African Studies*, 2 (2), p. 305–314. “Indigenous land claims” might be seen as the words commonly used in Kenya to refer to the phenomenon of autochthony.
 6. C. Médard, 1999.
 7. C. Médard, 2008.
 8. J. Willis, 1993.
 9. X. Péron, 1996.
 10. Kalenjin, Maasai, Turkana, Samburu.
 11. Republic of Kenya, 2002, 2004.
 12. H.W.O. Okoth-Ogendo, 1991.
 13. D. Ruysschaert, 2007.
 14. The Bomas constitution was drafted by the Kenyan Commission set up to revise the constitution. It was amended and became the Wako constitution, then rejected during the referendum of November 21, 2005.
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